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In the Supreme Court of the United States

OCTOBER TERM 1956

No. 296

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

(And Related Cases)

Petition for Writ of Certiorari

to

The United States Court of Appeals
for the Ninth District.

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FIRST: This case is in direct conflict with Indian Towing Co. v. U. S., 350 U.S. 61, in that the Government is not held responsible for failure to perform a duty which is expressly imposed upon it by state statute. 24

SECOND: This case is also in direct conflict with the same case in that the Court constituted itself as the "Guardian of the Treasury" by distorting the facts to evade the issues and ignoring the agreed facts and the state statute. 25

THIRD: This case is also in conflict with the same case in holding that where the Government

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constructs a ring dike for the apparent purpose of protection but with concealed defects making it worthless, it was not required to perform its "Good Samaritan task in a careful manner." 26

FOURTH: The Court denied the appellants a fair trial in violation of Article V of the Constitution by distorting the facts to evade the issues and refusing to recognize the agreed facts and the state statutes. 26

FIFTH: The Court approved the destruction of an extremely valuable easement belonging to the appellants without the purchase or condemnation thereof. This violates Article V of the Constitution prohibiting the taking of private property without due process of law. 28

SIXTH: The Court held that where a private dike is wrongfully destroyed the duty is upon the diking district and not the wrongdoer to protect against the same thus destroying the security of every diking district in the United States. 28

SEVENTH: The Court set precedents which seemed to authorize the wrongful destruction of a privately owned dike if the one destroying it does not anticipate danger therefrom as well as other precedents which would destroy the security of every diking district. 29

EIGHTH: The Court held that when a private dike is destroyed wrongfully the district has the right of sovereign domain and it is the district's duty to protect against the wrongful destruction even if it be necessary to condemn railroad rights of way outside its own district, the dikes of other districts, a public highway or dikes owned by the Government itself. 29

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Petitioner for himself and 51 other associated cases including Columbia Edgewater Country Club having some 450 owner-members prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District entered in the above entitled case on the 9th day of April, 1956. The list of these cases is set forth in the Findings of Fact, Appendix E, page 49, infra.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court (R 127) was written by the Honorable James Alger Fee, now a member of the Court of Appeals, and was unreported. It is printed in Appendix A, infra page 31. The Opinion of the United States Court of Appeals for the Ninth District was written by the Honorable Benjamin Harrison, District Judge for himself and Court of Appeals Judges Healey and Chambers. It is printed in Appendix B hereto, infra page 42.

JURISDICTION

The judgment of the United States Court of Appeals was entered on 9th day of April, Appendix C, page 48, infra. A timely petition for rehearing filed by petitioners was denied on May 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The question presented in this case was a very simple one. There were two districts, Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2 adjoining except for an eighty (80) foot strip of land belonging to the County. These two Districts provided for themselves through agreement with the County for the construction of an embankment that would act as a highway and as a levee between the two, an intermediate levee which would protect each District in the event of the failure of the dikes in the other. The Statutes of the State of Oregon provide that a levee cannot be sev-

ered by anyone except that he assumes the burden of providing substitute protection (ORS 551.140, Appendix D, infra pp. 48-49). The Government's agent, the Federal Public Housing Authority, severed this dike or levee. It then appropriated the entire embankment for its own protection in Peninsula District No. 1 lying to the west (Contention 23, R 96) by building a ring dike with hidden defects, a concealed underpass permitting water to flow from west to east but not from east to west and providing a clay blanket on the east to prevent washing of water from the east with no protection for floods from the west (R 52-53). It is undisputed, in fact it is contended by the Government, that this ring dike did not and was not intended to provide protection to Peninsula District No. 2 on the east (Contention 41, R 100). The 1948 annual flood somewhat higher than usual broke the railway fill which was the only protection District No. 1 had on the west. As a natural consequence, the flood flowed through the underpass into District No. 2 completely inundating that District causing terrific damage. The ring dike delayed the water for about thirty hours but was not sufficient to even permit emergency treatment to protect District No. 2. District No. 2 got no water from this flood except through this underpass (P.T.O.—R 82). The sole question presented by the pleadings and the Pre Trial Order was whether the Government was liable under the Tort Claims Act for damage to landowners in District No. 2 because of the wrongful cutting of this underpass and their failure to assume the burden imposed upon it by the Oregon Statutes to provide equal protection.

The Court, however, evaded the issues completely by distorting the agreed statement of evidence and in doing so set precedents and raised questions which we believe are of extreme importance to the entire country. These will be considered in the reasons for this Court taking jurisdiction.

STATUTES INVOLVED

28 U.S.C.A. 1346 (b).
33 U.S.C.A. 702 (c)
ORS 551.140 (O.C.L.A. 123-216).

STATEMENT

In 1948 the annual flood waters of the Columbia River broke through the railway fill which was the only protection the City of Vanport (a housing project built by the Federal Public Housing Authority) had and completely destroyed that project which was the second largest city in Oregon. As a natural result the flood waters and many of the buildings in Vanport washed through the underpass cut through Denver Avenue Embankment without adequate or equal protection on the east side of Vanport which was the western protection of Peninsula District No. 2 on the east, completely flooding District No. 2 and causing terrific damage (P.T.O. R 81).

Many residents of Vanport in Peninsula District No. 1 and 52 landowners in Peninsula District No. 2 filed action against the Government under the Tort Claims Act.

These two groups of claims were segregated and tried separately for the reason that the issues were entirely different. The Vanport cases involved only the Railway fill on the west of Vanport. The 52 landowner cases in District No. 2 involved only the destruction of the Denver Avenue embankment, their western protection. The breaking of the railway fill had no part in it.

The Vanport cases were tried under Clark vs. U. S. Two District Court opinions were written and published in 13 FRD 342 and 109 Fed. Supp. 220. The U. S. Court of Appeals decision appears in 218 Fed. (2d) 446. The 52 District No. 2 cases were consolidated and tried in this case, Tillman vs. U. S. The District Court's opinion was not printed. It is printed here in Appendix A, p. 31. The U. S. Court of Appeals opinion is printed herein Appendix B, p. 42.

In the District Court's opinion in Clark vs. U. S., 109 F. Supp., p. 220, the Court fully recognized the difference in the issues when it said,

> "The ground should be cleared first. Denver avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of, can be established * * *"

BASIC FACTS

As was said by the Court of Appeals, the Pre-Trial Order was meticulously drawn, and the little oral testimony neither added to nor detracted from this stipulated statement of facts.

Here are the facts as set out in the Pre-Trial Order which is not subject to dispute:

Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2 cover an area of some 2,500 acres bordering on the Columbia River and just outside the city limits of the City of Portland. It was highly valuable land for homes and industries if it could be protected from floods but under the conditions that would be extremely expensive. It was bordered on the North by the Columbia River, on the west by the Willamette River, on the south by Columbia Slough and on the east by the City Cut which was an extension of Columbia Slough, connecting with the Columbia River. It was therefore subject to floods from the Columbia River from all four sides. On the Willamette River side (on the west) the Railroad built a fill for railroad purposes. It was built by dumping dry sand over piling which were not removed. At that time this right of way was not subject to side pressure from floods and it was not built nor intended nor permitted to be used for diking purposes.

The Columbia River drains some 259,000 square miles of area. It heads some four hundred miles into Canada on the north, and drains the area from that point on the north to Nevada on the south and from the crest of the Rocky Mountains on the east to the Pacific Ocean on the West. The floods are also affected by the tides as Portland has a low elevation.

This area therefore is subjected to tremendously high floods with absolute certainty every spring when the accumulated winter snows in the vast mountain area begins to melt. The height of the flood each year de-

pends entirely on the weather. If the weather conditions cause the thawing of the snow over a large portion of the mountainous area so that the resulting water reaches Portland at the same time, there is a tremendously high flood. So there is always a tremendously high flood potential that must be anticipated every year.

About 1915 the Columbia River Bridge was built to connect the main interstate highway between Oregon and Washington. The South landing was about the center of the area making up the two Drainage Districts that were later organized.

Multnomah County was compelled to build an approach to this bridge across this area. It had to be built on a trestle to permit the flood waters to flow under or on an embankment that would withstand the floods. The Peninsula Industrial Company owned the land at that time. It conveyed two 80 foot strips to the County, together about 3 miles in length (Parcel A mentioned in the deed was for Union Avenue and Parcel B for Denver Avenue, at that time known as Dirby Street which was the main approach). The sole consideration for this deed was the agreement of the County to construct and maintain an embankment equal to the bridge approach over Parcel B Denver Avenue with the landowners having the right to hook on to it and use it. The County had the right to slough over the embankment on to the private ground as much as was necessary (Pre-Trial Order, R 22-25). The embankment was built to an ultimate width of 317.6 feet so that approximately $\frac{3}{4}$ of it rested on private ground (Pre-Trial Order, R 22). Obviously the

only use the landowners could make of this embankment was to use it as a levee. This arrangement was mutually beneficial. If drainage districts built dikes on either side, it would protect the highway embankment. If the dikes of either district broke, the highway embankment would protect the other. Union avenue ran through District No. 2 and no conditions were placed against the maner in which it should be built.

In 1917 Peninsula Drainage District No. 1 was organized on the west of Denver Avenue adopting that embankment as its eastern border and protection. It built dikes on the North and South but hooked on to the Railway fills on the west which were in the exclusive control and ownership of the Railway Companies and on which the District had no control whatsoever and which they had no right to use. This District remained as swamp land until taken over by the Federal Public Housing Authority for a housing project.

Later in 1917 Peninsula District No. 2 was organized on the east adopting Denver Avenue embankment as its western border and protection (Pre-Trial Order, R 17). They built dikes on the North, South and East. This district became highly developed with many homes, a golf course and many industries (R 450). There were so many families living therein that a grade school was built behind the Denver Avenue embankment as its only western protection.

The Denver Avenue embankment was constructed by the County and Highway Commission to an ultimate height of 37.6 feet and width of 317.68, a crown width

of 92′ with paved highway over the top of 56′ (Pre-Trial Order, R 22). It was over three times the size and strength of the strongest portion of the strongest dike on the perimeter and built in the identical manner. It was used by and considered as a dike protection by both districts at all times after 1917 and was always protected until severed by the FPHA (R 22, 26, 446, 251, 344, 347).

The deed to the County was excellently drawn (Exhibit 18, R 455). The County and its successors were given an easement to use the private ground on both sides for the fill and the right to maintain the highway over the top. The sole consideration was the agreement by the County for itself and successors to construct and maintain it and operate a highway over the top with an easement to the landowners and their successors to hook on to the embankment and use it.

By 1928 the embankment had been built to a height of 33′. Peninsula District No. 2 then applied to the Court for reorganization and the privilege of assessing the landowners $25.00 per acre to bring the outside dikes up to the equivalent of Denver Avenue. This was granted and as a result the outside dikes were built up to 33′ (Pre-Trial Order, R 26-27). During the same period, the Highway Commission increased the Denver Avenue embankment to 37.6′, 4′ higher than the outside dikes and over three times the size and strength (Pre-Trial Order, R 22).

In 1942 the Federal Public Housing Authority acquired about 80 per cent of Peninsula Drainage District

No. 1, west of Denver Avenue for construction of a housing project which they called Vanport. They desired an underpass through this embankment for the sole purpose of avoiding the necessity of crossing traffic. There was no connection whatever between District No. 2 and the underpass. There were other means of ingress and egress to and from the project. The Government condemned the ground east of Denver Avenue in Peninsula District No. 2 immediately adjoining the underpass including the embankment up to the east line of the 80' strip conveyed to the County. This was condemned expressly subject to the easement of Peninsula District No. 2 (R 471-472).

Application was made to the Highway Commission to cut an underpass through the embankment which would mean the destruction of the embankment as a levee and take away from Peninsula District No. 2 the only barrier it had against the floods from the west.

The statutes of the State of Oregon provided that where a landowner in any district over whose land a dike has been constructed must if he desires to destroy that dike, apply to the County Court for permission and he is burdened with the duty of providing substitute protection of equal strength to the satisfaction of the Engineers for the district (ORS 551.140, Appendix D, p. 48). No attention whatsoever was paid to this Statute. Instead they took a permit from the Highway Commission to construct a private way through this dike. The Highway Commission had no authority whatsoever except to give its permission to cutting this highway.

They still were required to get permission of the Court and bound with the duty of providing a substitute dike of equal protection (ORS 551.140, Appendix D, p. 48).

After cutting the underpass and destroying the protection of the embankment to both districts, the Government built a ring dike on the east side in District No. 2 on ground then owned by it. This ring dike was about the same size as the outside dikes and gave the appearance to a layman that it provided equal protection to both districts (R 51-53, Pre-Trial Order). However, it was admitted by the Government and testified to by their expert witnesses and stipulated in the Pre-Trial Order that it gave no adequate protection whatever to District No. 2 on the east (R 52-53, Pre-Trial Order, R 239-226).

It had a concealed culvert permitting water to flow freely from west to east but with a flood gate preventing the flow from east to west. It had a clay blanket on the east side to prevent wash from water coming from the east but no similar blanket on the west to prevent wash from water coming from the west. The Government's contention was that no authority was given to anyone to protect District No. 2 and there was no intention of giving any such protection (Contention No. 24, R 97). The contention was that the ring dike was built only to protect the Government's dollar investment in District No. 1. Thus the Government appropriated the entire embankment from District No. 2 for the sole protection of its own investment in District No. 1 and completely destroyed its protection to District No. 2.

Two employees of Portland Housing Authority operating Vanport for the Government secured the advise of a Government Engineer and recommended that the ring dike be brought up to standard but were only scolded for their interference (R 362, 363—R 193).

When the annual flood came in 1948, it was somewhat higher than the average. The railway fill about a mile and half west of District No. 2, on the west side of District No. 1 broke. The ring dike could not be protected (R 81). When it swept away the flood with a lot of buildings in Vanport swept through the underpass completely flooding District No. 2 and causing terrific damage to the entire district including the properties of the plaintiffs. District No. 2 got no water from this flood except through the underpass (R 82—PTO). The flood occurred on a holiday so that the grade school was not in operation and a possible and probable terrific catastrophe was avoided and there was no loss of life.

These are the stipulated facts in the Pre-Trial Order and are not subject to dispute, nor did the Government attempt to dispute them.

ERRONEOUS FINDINGS OF THE DISTRICT COURT RESULTING IN A DISTORTED PICTURE

In the Vanport cases, Clark vs. United States, 218 Fed. (2d) 446, p. 452, it was held that Sections 702 C of 33 U.S.C.A., "expresses a policy that any federal aid to the local authorities shall be conditioned upon federal non-liability."

Based on this the Court held there could be no liability attached to the Government on account of failure of the dikes on the West side of Peninsula District No. 1, the Railway fill.

There was no reasoning by which this could apply to the Denver Avenue embankment. Therefore, in order to relieve the Government from liability in this case, it had to be found that the landowners in District No. 2, east of Denver Avenue relied on the railway fill a mile and a half outside of their district and not on their own border.

Here is the distorted picture resulting from the Distric Court's findings (Appendix E, p. 49) which the District Court drew in its opinion and which was echoed by the Court of Appeals. We here set out the steps taken one by one, each being followed with a statement as to the true facts.

1. The agreement between landowners and Multnomah County in reference to the construction of an embankment was quoted by the Court as follows in Note 10, Court Opinion, R 133, Appendix A, p. 31:

> "* * * this conveyance is made upon the following express conditions * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *"

True Facts

When you insert the essential wording of this agreement for which asterisks were substituted in this quotation then the agreement reads as follows:

> "* * * this conveyance is made upon the following express conditions * * * (a) * * * Multnomah County shall within three years of the time of this conveyance construct or cause to be constructed and thereafter maintained * * * a fill and embankment which shall as far as possible duplicate the fill and embankment to be constructed by said Multnomah County upon Parcel A as described herein * * * and shall * * * thereafter maintain a public highway [thereon]"

Thus by omitting the essential wording of this agreement, the Court has emasculated the agreement and interpreted it only as an agreement to construct a fill and maintain a highway thereover.

2. In Note 7, of the Court's Opinion (R 132, Appendix A, p. 36), the Court said,

> "The plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected 'by its west, north, and south levees, connecting with system No. 2'. District No. 2 planned to construct levees on the east, north and south. The plan concluded, 'It is apparent that this will affect a complete closure of the land included in this district against high water'."

(R 132, Appendix A, p. 36).

> "District No. 2 adopted the western embankment [the railway fill a mile and a half outside the district] as one of its guards against overflow, as it did the other works which primarily defended District No. 1."

True Facts

This statement made by the Court is a strained interpretation of the Engineer's report made at the time of the organization of Peninsula District No. 2, Exhibit

27, R 334. The sentence quoted by the Court, "It is apparent that this will affect a complete closure of the land included in this district against high water", clearly and unquestionably referred to the Denver Avenue embankment as a protection for the District on the west. The Engineer Mr. Dater in making this report made the obvious and parenthetical remark that there would be no water against this embankment unless the dikes of District No. 1 on the west should fail. To interpret this, however, as eliminating the Denver Avenue embankment and placing the entire reliance on railway fills and dikes outside of their District is so strained an interpretation that it could only be prompted by a desire, as we see it, to eliminate the Denver Avenue embankment from consideration and with it the entire issues in the case. The Court completely ignored the petition for reorganization which made no reference to District No. 1 or its dikes or the railway fills (Pre-Trial Order, R 25-26) and completely ignored the Court's order organizing the District (Exhibit 26, R 302) in which no reference whatsoever was made to the railway fills or the dikes of District No. 1 or to that District but instead recited that the District was already partially protected by embankments on the border which would include the Denver Avenue embankment.

No such contention was made by the Government in their answer or in the Pre-Trial Order. They recognized the true situation and it was stipulated in the Pre-Trial Order as follows (R 30):

> "The levees of that district provide protection for Peninsula Drainage District No. 2 in the sense that

> in the absence of a failure of one or more of these levees, flood waters can not approach Peninsula Drainage District No. 2 from the west."

3. In the Opinion of the District Court (R 128, Appendix A, p. 32), the Court said:

> "District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both."

True Facts

These Districts were divided by 80 feet, the highway strip conveyed to the County. The dikes on the north of the two districts met this embankment at the same spot but on the south, they did not meet by some 400 feet. (See map Appendix G, infra, p. 62.) Thus without the Denver Avenue embankment neither District had any protection whatsoever, nor did the dikes of the two districts connect.

4. In the Opinion of the Court (R 128, Appendix A, p. 32), the Court said,

> "Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue."

and next to the bottom of the same page,

> "* * * there was no request by anyone that the Denver Avenue fill be strengthen as part of the protective works."

True Facts

The Denver Avenue embankment was already over three times the size and strength of the strongest portion of the strongest dike on the perimeter after those

perimeter dikes had been strengthened by Government aid and was built in the identical manner (Pre-Trial Order, R 22, 23).

5. In the Opinion (R 130, Appendix A, p. 34), the Court said:

> "As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers."

True Facts

As already pointed out this embankment was already over three times the size and strength of the other dikes after they had been strengthened. But it is shown by the Pre-Trial Order (R 22) the work of the Engineers was completed in 1940, a full two years before this underpass was thought of or this ring dike constructed.

6. In the Opinion of the Court (R 129, Appendix A, p. 33), the Court said that the underpass through this fill was built by the State Highway Commission "for the convenience of persons living in both Districts."

True Facts

This would imply consent and approval on the part of the Districts. It appears by the undisputed evidence that District No. 2 passed resolutions objecting to the underpass, that it appointed Mr. Ivan Phipps, their attorney (R 344) who was also president of District No. 1 and Mr. Phipps made strenuous objections to the State Highway Commission against the construction of the underpass on behalf of both Districts (Exhibit 34,

R 427). The FPHA gave no notice or opportunity to either district to object. In addition to that the underpass was completely blocked off by the ring dike constructed by the FPHA and there was no possible use that District No. 2 could make of it.

7. In the Opinion of the District Court at bottom of page 130 R, (Appendix A, infra, p. 34), the Court said,

> "This is a case of afterthought not forethought on the part of plaintiffs in District No. 2."

True Facts

The agreed statement of facts in the Pre-Trial Order showed that these two Districts provided for themselves this intermediate dike which was over three times the size of any outside dike, that they had relied upon it for over thirty years prior to the flood (R 22, 26, 446, 251, 344, 347). The Government had constructive notice of the rights of the District to use this embankment by reason of the fact that two deeds were on record setting forth the agreement. In addition the Government in condemning land on the east side of the underpass for the construction of its ring dike took that property subject to these easements, therefore, had actual knowledge (Exhibit 78, R 472).

8. In the Opinion of the Court appearing at R 134, Appendix A, p. 37), the Court said,

> "But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke."

True Facts

This embankment was built as a link in the Interstate Highway connecting with the bridge across the Columbia River over an area that was subject to high floods of the Columbia River from all four sides. It had to be built either on a trestle to permit the water to go under it or on an embankment that would withstand the annual floods which occur every year with absolute certainty. It was built in the identical manner of the outside dike and over three times the size and strength. It was over three times the size and strength of the ring dike which the Government maintained was sufficient to stand the weight of water from a much higher flood and coming down stream with the current in the event of the overtopping of the dikes in District No. 2. And this same embankment was adopted and appropriated to guard against just such a flood.

9. In Finding No. 9 adopted by the District Court, R 143, Appendix E, infra, p. 53, it is said,

> "In the exercise of due care, there was no reason to anticipate a failure of the western embankment * * * [the railway fill]"

True Facts

The only basis for this finding is the testimony of one or two witnesses that they had no anticipation of it. There was no showing as to what they knew about it. The facts are, however, that the landowners anticipated it when the District was organized. The same Court in the Vanport cases, Clark vs. U. S., 109 Fed. Supp. 213 at p. 227:

> "Each of plaintiffs could have found as easily as other persons in the area that the Columbia has from time to time been subject to tremendously high water. * * * This fact has been of national importance. The Court would take judicial notice of this fact as well as of the floods in the Mississippi. It could have been ascertained by any plaintiff as a matter of general knowledge that such floods do overtop and break down protective works and dikes. * * *"

Government Engineer Dibblee in his completion report, R 445, at page 446 says,

> "* * * on the west by Denver Avenue, which is an Oregon State Highway embankment that acts as a dividing levee between Peninsula No. 1 and No. 2 Drainage Districts."

and in his recommendation, he recommends the following on page 454 R,

> "5. Elimination of underpass through Denver Avenue."

As we see it, when two Districts provide a dike for themselves whether it be needed or not, no third party would be authorized to destroy that dike merely because they did not anticipate its need.

10. The Court in its Opinion (R 129, Appendix A, p. 33), says that the Highway Commission "had already constructed two underpasses in Denver Avenue."

True Facts

The Court neglected to point out that one of these underpasses to the south which would have destroyed the protection of Denver Avenue embankment for Peninsula District No. 2 was protected by moving the South

dike of District No. 2 to the North leaving the underpass outside of the District (PTO—R 29) and in the other that the Commission made use of high ground and made a fill to protect District No. 2 (R 28—PTO) up to the full-height of its outside dikes, although about 4' lower than Denver Avenue embankment.

11. The Court in its Opinion (R 129, Appendix A, p. 33), said,

> "The State Highway Commission * * * was requested to and did build * * * an underpass * * *"

and on page 133 R, Appendix A, p. 37, the Court said,

> "The Government did not construct or have control of Denver Avenue or the by pass * * *"

True Facts

The permit given by the Highway Commission, (Exhibit 23, p. 293 R, Appendix F, infra, p. 58), establishes beyond question that this was built by the Government for a private way for its own convenience and that it had full control of the bypass.

12. The Court in its Opinion stated (R 134, Appendix A, p. 37),

> "It is specifically stated that no reliance was placed upon it [Denver Avenue embankment] * * *"

True Facts

There is positively no foundation whatsoever found in either the statement of facts or in the evidence to support this statement.

13. The Court in its Opinion (R 137, Appendix A, p. 40), said,

"The Government owed no duty to these landowners."

and on page 138 R, Appendix A, p. 41,

"No act or omission was proved which constituted negligence on the part of the government."

True Facts

The Court in arriving at this conclusion entirely ignored the Statutes of the State of Oregon, Section 123-126 OCLA—ORS 551.140, Appendix D, p. 48, which expressly provided that under such circumstances, the one cutting the underpass is bound with the duty of substituting equal protection which admittedly was not done. The Government's own expert witness, Mr. Willard J. Turnbull, testified that it would not be sound to take out a secondary or intermediate levee (R 244).

14. The Court in its Opinion (R 130, Appendix A, p. 34), said,

"This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the water which rushed into District No. 1 when the western embankment failed."

True Facts

This is apparently based on the assumption that since the water was delayed for thirty hours it gave the people an opportunity to save their lives and salvage some of their personal property. The damage here complained of was substantially all to real estate and not for the lives that were saved or the personal property that was salvaged.

As a matter of fact, the ring dike was not a benefit but was a disastrous detriment. The people of District No. 2 knew they had the protection of Denver Avenue embankment. They knew the Statutes of the State of Oregon placed the duty upon one destroying that embankment to substitute equal protection. The ring dike had the appearance of being equal to the outside dikes but due to concealed defects was of no value to District No. 2 for protection. The people in the District relied on this protection, continued to build (Exhibit 66, R 450) and continued to stay in their property. If they had known that the ring dike gave them no protection, something would have been done about it, if possible, and if not, the District would have been evacuated voluntarily and it would have been unnecessary for the District to have been evacuated by the County and State officials (PTO—R 81).

15. Based upon these findings which were all incorporated into the findings of fact, the Court by adopting this false premise eliminated Denver Avenue completely as though it never existed and then made this finding which appears in the Opinion of the Court (R 133, Appendix A, p. 36),

> "The breaking of the western embankment [the railway fill] upon which these landowners relied for safety was the sole cause of disaster."

True Facts

With this elimination of Denver Avenue embankment which was the sole issue in the case also went the complete issues which involved the Denver Avenue embank-

ment only. The same Court in the Vanport cases, Clark vs. U. S., 109 F. Supp. p. 220, said,

> "The grounds should be cleared first, Denver Avenue fill broke after Vanport was flooded so no causal conection between that incident and any property damage here complained of can be established * * *"

Clearly if District No. 2 relied on the Denver Avenue embankment the breaking of the railway fill a mile and a half outside the District was too remote to be held to be the proximate cause.

Due to the fact that all legal principals involved within the issues were held by the Court in favor of the plaintiffs and were clearly in their favor, practically the entire appeal was based on misfinding of facts, as herein set forth. The Court of Appeals summarily dismissed our objections in the following words,

> "Without setting forth each assignment of error suffice it to say, the findings of the trial court are sufficiently substantiated by the transcript of record."

REASONS FOR THIS COURT TAKING JURISDICTION

FIRST: This case is in direct conflict with the case of Indian Towing Co. vs. U. S., 350 U.S. 61, 100 L. Ed. p. 83. In that case it was held that where the Government undertakes to maintin lights for the benefit of shipping, it assumes the duty to keep them burning or to notify shipers when they are out of commission and is guilty of negligence in failing to do so. In this case the Government's agents, Federal Portland Housing Authority, wrongfully cut an underpass through a very sub-

stantial dike which Peninsula District No. 2 had provided for itself and destroyed the easement which the District had thereon, and provided no adequate substitute security. The mere wrongful cutting of this dike would place a duty on the Government to substitute equal protection. In addition thereto the Statutes of the State of Oregon (ORS 551.140, Appendix D, p. 48), expressly placed this duty upon them. Both the District Court and the Court of Appeals held that the Government had no such duty and completely ignored the Oregon Statute expressly placing that duty upon the Government.

SECOND: This case is also in direct conflict with the same case, Indian Towing Co. vs. U. S., for the following reasons:

In that case this Court said,

> "Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

In this case, as we see it, the Court did constitute itself as a guardian of the Treasury and held in effect that the Government could do no wrong, by completely ignoring and refusing to consider the issues. The issue was the wrongful cutting of the Denver Avenue embankment without providing substitute security. The Court held that the flooding was caused solely by the breaking of a railway fill a mile and a half outside the District in the exclusive control of the Railway Company. A

cause that was entirely too remote, a defense that was never raised by the Government and a circumstance which was never considered or mentioned in the pleadings or the evidence. Then the Court attempted to justify this finding by eliminating the Denver Avenue embankment by a distorted statement of facts.

THIRD: This case is in conflict with the Indian Towing Co. vs. U. S. in still another important item. In that case this Court said,

> "BUT the statutory language is 'under like circumstances', and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner."

In this case the Government built a ring dike around this underpass which had every appearance to a layman of being equal to the outside dikes and therefore sufficient but the evidence showed that the ring dike had concealed defects which made it worthless for protection of District No. 2. Also the Government was requested by their own employees to bring it up to standard but these employees were only scolded for their interference. It is our position that when the Government undertook to build a ring dike around this underpass for protection thereby holding out to the landowners in District No. 2 that it was protected, they were responsible for not having done so.

FOURTH: By evading the issues and refusing to recognize the facts, the Court has raised constitutional questions as follows:

Article 5 of the Constitution insures every citizen a fair trial. The question is, "Can a citizen have a fair trial when the Court evades the issues and refuses to recognize the agreed facts and refuses to recognize state statutes?" Oddly enough, the same court said in Clark vs. U. S., 13 F.R.D. p. 342, and very well in that opinion answered this question when it said,

> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff, and it is entire [in] justice to require the defendant to accept some theory of law propounded by the Court for the first time in the opinion. * * * The defendant should be bound by such theories as well as the plaintiff, and the Court should not find some other ground on which to deflect the attack * * *"

In this case there are some 500 people involved. They know that they had Denver Avenue embankment as protection. They know the state statute prohibited destruction thereof without substituting equal protection. They know when they are told by the Court that they did not rely on this immense embankment on their border when they had a specific contract and an easement thereon for its use but relied upon a railway fill a mile and a half away over which they had no control whatsoever, and the state statute was not recognized, that the Court has evaded the issues in the case and that they have not had a fair hearing. We respectfully suggest to the Court that such a finding is destructive of the faith of the people

in the Federal Courts and the damage therefrom far outweighs the dollars saved to the Government Treasury.

FIFTH: A further constitutional question arises in that the Government took the land for the purposes of building the ring dike on the east side of Denver Avenue embankment immediately adjoining the underpass expressly subject to the easement of the Peninsula Drainage District No. 2 for the use of the embankment. This land included a portion of the embankment up to the east line of the right of way. This easement of Peninsula District No. 2 was destroyed by FPHA by the biulding of the under pass without providing equal protection. The Government did not condemn nor purchase this easement but simply destroyed it. The District Court and the Court of Appeals refused to recognize this easement or to comment thereon. The question arises then, "Is this the taking of private property without due process of law?" We feel that it is and that if such an act is sanctioned or ignored by the Courts, then no one can rely upon that provision of the Constitution.

SIXTH: Both the District Court and the Court of Appeals held that when two adjoining drainage districts provide for themselves an intermediate dike to guard each district against the failure of the dikes in the other, and that dike is cut wrongfully by a third party, the duty to provide against such destruction falls upon the District itself and not upon the wrongdoer. And if the District does not so provide for such protection itself the wrongdoer is clothed in immunity.

This ruling we believe is of extreme importance to

every drainage and irrigation district in the United States. It is a precedent that violates every legal principal involved and one that cannot be supported by the Courts.

SEVENTH: The decision of the District Court as well as the Court of Appeals in this case seems to be that where two adjoining districts provide such an intermediate dike for mutual protection that it can be cut with immunity by any third party who does not anticipate the breakage of dikes in either district or if sufficient embankment be constructed to delay the floods up to a period of 30 hours to permit the residents to save their lives and salvage some personal property. These seem to be precedents set by this decision and it is of the greatest importance to every drainage and irrigation district in the country. It also seems to us to be of the greatest importance to the Courts that such precedents be not permitted to stand.

EIGHTH: Both the District Court and the Court of Appeals held that when this embankment was severed it was the duty of the District itself to protect against it and that they had the power of sovereign domain which they could exercise for that purpose. The suggestions of the Court seems to be that District No. 2 should have condemned the railway fills a mile and a half outside the District which would also have necessitated the condemnation of both the south and north dikes of District No. 1 as well as at least a portion of the Denver Avenue embankment. Or it should have condemned the Denver Avenue embankment or it should have condemned the

land belonging to the Government on which it had built its ring dike for its own protection. The layout of the area shows that the only alternative to one of these would be to build another dike paralleling the Denver Avenue embankment through the center of its District thus eliminating a portion of the District. Then if they were to do this, then this case would seem to be authority for the new dike to also be destroyed in a similar manner. This would seem to demonstrate the ridiculous position in which a Court may find itself by refusing to consider the issues and the evidence involved.

As it appears to us, if this case is not reversed and it can be cited as authority for anything, then no diking or irrigation district in the United States can afford to build dikes or levees for their own protection.

CONCLUSION

For the foregoing reasons we pray that a writ of certiorary should be issued by this Court and the judgment below should be reversed.

DONALD C. WALKER
and
VIRGIL CRUM

Attorneys for Petitioners

APPENDIX A

[Title of District Court and Cause.]

OPINION

February 23, 1954

James Alger Fee, Chief Judge:

The plaintiffs, owners of property within the boundaries of Peninsula Drainage District No. 2, brought actions in fifty-two several cases against the United States for damage caused by floodwaters to their individual properties.

There was a comprehensive pretrial order and a trial. The facts are.

On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County a strip of land cutting through a large body of property, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in the channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the county. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank.

On March 26, 1937, this highway, then called Denver Avenue, was conveyed to the Oregon State Highway

Commission. This was the boundary accepted by two drainage districts, called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. Plaintiffs in these cases own property in the latter, which was organized under the drainage district laws of the State of Oregon in 1917. District No. 1 was protected from flood on the north, west and south by railroad fills and by constructed levees, none of which was owned or managed by the United States. These same works protected Distict No. 2 on its western side. District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both. Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue.

Between 1934 and 1944, the United States, acting under the authority of Congress, reconstructed the north, south and east levees of District No. 2 with concrete walls and earth fills. Control of these levees was formally surrendered to District No. 2 on August 2, 1944. Although the work and the plans therefor were approved by District No. 2, there was no request by anyone that the Denver Avenue fill be strengthened as part of the protective works.

The United States, also pursuant to congressional authority, rebuilt the north and south levees of District No. 1. Notwithstanding the plans for the work were approved by District No. 1, there was no suggestion from

anyone that the western embankment, owned and in control of the railroads but adopted by both districts as an existing work, should be reconstructed or strengthened by the United States.

In 1942, the government condemned a great portion of the land in District No. 1, and the City of Vanport was erected thereon. Control of this area was eventually placed in the Portland Housing Authority.[1] The State Highway Commission, which had already constructed two underpasses[2] in Denver Avenue, was requested to and did build with federal funds an underpass through the fill for the convenience of persons living in both drainage districts. No protest was made by District No. 2, nor any suggestion by anyone that District No. 2 needed protection from waters from the west. It is true, a resolution mildly suggesting that objection to the construction of the underpass without a "stop log" was passed by its board of directors and placed among the minutes of the Board, but it seems never to have been called to the attention of anyone outside this group.

However, upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the opening of the underpass upon the upriver side in District No. 2. The purpose of this ring levee was to

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[1]The Portland Housing Authority is a federal agency and its employees are employees of the government. But that does not help the plaintiffs. Clark vs. United States, 109 F. Supp. 213, 223.

[2]One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and the other affected the system in no way but to lower the Denver Avenue fill by four feet.

afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 were overtopped. As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers. This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed.

On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment, which was the railroad fill adapted by these districts, failed, permitting the water flooding to overflow that area. The waters were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m., on May 31, 1948, when the ring levee constructed on the east of the underpass to protect District No. 1 from water approaching from that direction failed, and, as a result, District No. 2 and the properties of plaintiffs were inundated.

This is a case of afterthought, not forethought, on the part of plaintiffs and District No. 2.

These landowners themselves continuously excluded the Columbia River from part of its ancient bed for their own purposes. For the major portion of their lands are below the originary high water level of the Columbia River and in places more than thirty-two feet below the flood level reached at the time of the failure of the western embankment of District No. 1.

In order to construct or to have benefit of defensive works, these landowners or their predecessors, under Oregon statutes, formed a drainage district which was endowed with certain sovereign powers and was charged, as was each acre within its boundary, with the responsibility of erecting adequate works for protecting lands from overflow.[3] This duty was continuous and involved repair, maintenance and strengthening of existing walls.

The very purpose of the creation of this subdivision of the State of Oregon was that protective function. This is the law and essence of its being. In accordance with the immemorial custom of the village communities of early England [4] and a like policy crystallized in the statute law of the State of Oregon,[5] this Court has held

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[3]Oregon Laws, 1915, c. 340, provides that a drainage district may be formed for the purpose of having the lands within it "reclaimed, and protected * * * from the effects of water, * * *." See O.R.S. 547.005.

[4]It is pointed out in the Introduction to A Terrier of Fleet Lincolnshire, Nielson (Oxford University Press, 1920), a manuscript, the latest document of which is dated 1320, that the incidence of the duty to repair dikes was customarily apportioned among the land affected. "In Walsoken, for example, every acre repaired four feet of sea-bank and one foot of Podike; every acre in West Walton repaired six feet two inches of sea-bank and one foot of Podike." (p. xiv). See also II Cooley's Blackstone 908 (Book III) (4th Ed., 1899).

[5]Oregon Laws, 1915, c. 340, § 17, provides that the costs of constructing and maintaining protective works shall "be apportioned to and levied on each tract of land within said district * * *." Laws, 1921, c. 14, provides that "lands belonging to the State of Oregon * * * shall be subject to the same burdens and liabilities * * * as lands in said district belonging to private individuals." O.R.S. 547.455.

that the burden of maintaining adequate seawalls and works for drainage runs with each acre of the protected lands, no matter if the sovereign be the owner.[6] This municipality, not the United States, is charged with the responsibility for prevention of overflow of water upon lands belonging to the individual plaintiffs. These very plaintiffs, as owners of such lands, owed the duty of protection to the whole area within the municipality.

District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.[7] This the District had a legal right to do under the statutes of the state.[8] The breaking of the western embankment upon which these landowners relied for safety was the sole cause of distaster. It has already been decided that the United States owed no duty to insure the stability of the western wall.[9] The government had not built this rampart, did not own it, did not own the ground upon which it stood, and did not at the date of the failure and

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[6]United States vs. Florea, 68 F. Supp. 367. See also United States vs. Aho, 68 F. Supp. 358.

[7]The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected "by its west, north, and south levees, connecting with system No. 2." District No. 2 planned to construct levees on the east, north and south. The plan concluded, "It is apparent that this will affect a complete closure of the land included in this district against high water."

[8]Oregon Laws, 1915, c. 340, § 29. O.R.S. 547.315.

[9]Clark vs. United States, 109 F. Supp. 213, 220: "No duty of the United States to maintain this embankment can be discovered * * *."

had not previously exercised any control over this structure designed to carry railroads.

The government did not construct or have control over Denver Avenue or the by pass, although this was built with federal funds, and the ring levee stood on lands which it had condemned. Denver Avenue was not designed as a water repellant wall.[10] It is specifically stated that no reliance was placed upon it, and it is mentioned only casually as furnishing additional protection.[11] In fact, it did so even in this disaster. But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke.

It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby.[12] But for six years after the underpass was cut

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[10]Plaintiffs contend that language of the deed from Peninsula Industrial Company to Multnomah County establishes their right to have Denver Avenue maintained as a dike. They place their reliance on the following: "* * * this conveyance is made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *."

[11]The Plan for Reclamation of District No. 2 states: "* * * this fill upon completion of District No. 2 will not act as a dike." * * * It will, however, constitute an additional element of security * * *."

[12]For example, one who suddenly releases flood waters from a dam is held liable for the damage caused thereby. Crawford vs. Cobbs & Mitchell, 121 Oregon 628; Loveless vs. Ruffcorn, 143 Iowa 221; House vs. Los Angeles County Flood Control District, 25 Cal. 2d 384.

and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and assessment for these express purposes.[13] Therefore, the cutting of the underpass and the failure to provide unbreakable work may have been a condition which resulted in damage, but it was not a cause, proximate or otherwise.

But, it is said, the Court is bound by its previous decisions,[14] the principles of which fix liability here on the United States. It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages.[15] Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute.[16] Furthermore, the particular agent who performed the act or was guilty of the omis-

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[13]Oregon Laws, 1915, c. 340; O.R.S. 547.305, 547.455, et seq.

[14]Plaintiffs cite two decisions of this Court in support of their contentions, Ure vs. United States, 93 F. Supp. 779, and United States vs. Florea, 68 F. Supp. 367. They attempt to distinguish Clark vs. United States, 109 F. Supp. 213, which denied to residents of Vanport recovery for damages caused by the same disaster as involved herein.

[15]Clark vs. United States, 109 F. Supp. 213, 223.

[16]Ure vs. United States, 93 F. Supp. 779, 792.

sion need not be pointed out and proved by name.[17] Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government officer or agent.[18]

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[17]This implication seems to arise from the language of the Court in the case of Dalehite vs. United States, 346 U. S. 15, 44-45, where it is said: "It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. * * * But the statute requires a negligent act." These two sentences are diametrically inconsistent. For the purposes of clarity, it is noted that, in the instant case, this Court, in finding no liability here, does not rely upon the fact that the individual agents of the government are not named or designated. The statute says, "The United States shall be liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances." If, under the law of the state, a private individual could be held for release of waters over the land of another, the United States can be also. Inaccurately labeling the state doctrine as one invoking "liability without fault" by arbitrary fiat determines there can be no fault except negligence. Here this Court only holds that a private person would not be liable under the exact circumstances.

[18]In order to make this clear, the Court draws a vital distinction between injuries which are the direct result of the plan adopted in discretion and the result of carelessness or wilfullness in execution or result in a direct trespass illegally. If in discretion, it is decided to poison coyotes, the government will still be liable, as would a private person, for setting a spring gun without proper safeguards to discharge the poison into the mouth of the animal (Worley vs. United States, Civ. 5336, opinion dated November 17, 1952, D.C. Ore.), where the detonating of explosive caused direct trespass to plaintiff's lands even if discharged according to plans, the United States should be liable. Boyce vs. United States, 93 F. Supp. 866 should be disapproved, since the individual who set off the blast could have been held personally liable for trespass even though they followed the plan and were employed by the United States. The reason why the result in Thomas vs. United States, 81 F. Supp. 881, is correct is because of the statute exonerating the United States from damage by flood. The Court is carefully re-

The exercise of administrative discretion as a result of "policy judgment and discretion" may free the government from liability in handling explosives necessary for national defense in time of war.[19] But the application of such a principle here or in the cases just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong.[20]

Here, the United States is not liable. The government owed no duty to these landowners. The employees of the Portland Housing Authority are not shown to have done anything legally significant. The United States was not responsible for the failure of the western embankment, which was the sole cause of disaster. The government had not deliberately banked waters high over the lands of plaintiffs and permitted these to overflow. No liability was thus established by creating a highly dangerous situation.[21] These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred.[22] So there could

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fraining from basing nonliability upon the discretionary clause of the statute which only covers injuries resulting directly from major policy decisions.

[19]Dalehite vs. United States, supra.

[20]Justice Jackson, dissenting in Dalehite vs. United States, 346 U. S. 15, 60, expresses a fear that the interpretation therein of the Tort Claims Act merely amends the ancient adage to read, "The King can do only little wrongs."

[21]Oregon cases dealing with liability for damage caused by the creation of highly dangerous conditions and the theories on which such liability is based are discussed in Ure vs. United States, 93 F. Supp. 779, 788-791.

[22]The United States was held liable for damage negligently caused by a break in a canal built high on a hillside, flooding plaintiff's lands. Ure vs. United States, 93 F. Supp. 779.

be no trespass. The government agents were not in control of the waters so that the doctrine of res ipsa loquitur would apply. [23] No act or omission was proved which constituted negligence on the part of any agent of the government. Finally, the United States is not liable for damage caused by flood.[24]

Findings, conclusions and judgment in accordance herewith and in favor of the United States should be drawn by the attorneys and submitted to the Court.

APPENDIX B

[Title of Court of Appeals and Cause.]

Before: HEALY and CHAMBERS, Circuit Judges, and HARRISON, District Judge.

HARRISON, District Judge:

This is an appeal from the United States District Court for the District of Oregon, wherein the government was held not liable under the Federal Tort Claims Act for property damages caused by floods when the Columbia River went on a rampage in the year 1948.

The facts disclose that in 1949 fifty-two separate actions were filed against the United States government for damages resulting from the cutting of an underpass through the Denver Avenue embankment. All the plain-

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[23]The "control" required before the doctrine of res ipsa loquitur may be applied is carefully analyzed in Gow vs. Multnomah Hotel, Inc., 191 Oregon 45.

[24]"No liability of any kind shall attach to or rest upon the United States for any damage from or by floodwater at any place." 33 U.S.C.A. § 702(c). Clark vs. United States, 109 F. Supp. 213.

tiffs were landowners in the Peninsula Drainage District No. 2.

Denver Avenue was first constructed by the County of Multnomah in 1915. It consists of a high embankment or fill, over thirty feet in height and supports pavement fifty-two feet in width. It was constructed as an approach to the international bridge which connects Oregon with the State of Washington.

In 1937 the State Highway Commission assumed full and complete jurisdiction of this highway in accordance with the laws of the State of Oregon. (See O.C.L.A. §100-130; O.C. 1935 Supp. §44-156).

With the advent of war in 1942, the government, pursuant to the necessities of war, caused to be constructed a large housing project to the west of Denver Avenue, covering about a square mile of land which became known as Vanport.

The contractors of the housing project sought, through the Oregon Highway Commission, a means of entrance or egress to this large housing project for convenience of the inhabitants thereof, as well as those living in Drainage District No. 2.

The engineers of the State Highway Commission realizing the impracticability of intersecting Denver Avenue, due to the heavy traffic thereon, devised and planned an underpass beneath it. The underpass was constructed by the said Commission under plans and specifications provided by it. The contract for such construction was let to Tower Sales and Erecting Company

by Kaiser Company. The work of building the underpass proceeded to completion under the constant supervision and inspection of said Highway Commission.

Denver Avenue was designated as the dividing line between two drainage districts called Peninsula Drainage District No. 1, which was downstream and Peninsula Drainage District No. 2, which was upstream. Plaintiffs in this case own property in Drainage District No. 2, which was organized under the Drainage District Laws of the State of Oregon. District No. 1 was protected from floods on the north, west and south by railroad fills and by levees. The same works protected District No. 2 on its western side. District No. 2 between 1917 and 1921 built dikes on its north, south and east sides which conected with the works of District No. 1, thus completely surrounding both districts. Neither district spent time nor money in attempting to strengthen the mound-fill upon which Denver Avenue is located. At no time was any request made of any one that the Denver Avenue fill be strengthened as a part of the protection to be afforded said Drainage District No. 2.

After the construction of the underpass at Denver Avenue and upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the upriver side of the opening of the underpass in District No. 2. The purpose of the ring levee was to afford protection to District No. 1 from possible overflow of flood waters from the east in the event of failure of the dikes of District No. 2. Subsequent events disclosed it did afford some protection to the properties located in District No. 2.

On May 30, 1948 an unprecedented flood of the Columbia River occurred. The western embankment, which was the railroad fill, failed, resulting in the flooding of District No. 1. District No. 2 was protected by the Denver Avenue fill until the next day, May 31st, when the ring levee constructed at the east of the underpass gave way, and as a result District No. 2 was also flooded.

Both districts continuously diverted, for their own purposes, the Columbia River from a part of its ancient bed. The major portion of their lands are below the ordinary high water level of the Columbia River.

In order to construct or to have the benefit of protection works under the laws of Oregon (See O.C.L.A. §123-101), these landowners or their predecessors were endowed with certain powers and charged with the responsibility of taking the necessary action to protect lands within their respective districts and had the authority to levy assessments to do so.

District No. 2 depended on the western embankment of District No. 1, to protect it from overflow from the west. The breaking of the railroad embankment was the sole cause of the flooding of District No. 2. Said failure was not due to any negligence upon the part of the defendant, its agents or employees. (Clark v. U.S. 109 Fed. Supp. 213).

The federal government did not construct or have any control over Denver Avenue or the underpass. (See O.C.L.A. §100-130). While the federal government paid

for the construction of the ring levee and it stood upon government owned land, it was never relied upon by District No. 2 for protection. If any reliance was placed thereon, it was by District No. 1. The same is true insofar as Denver Avenue is concerned. Denver Avenue possibly may have been constructed differently. No one contemplated any danger of overflow from the west, and as a result for six years after the underpass was cut and the ring levee constructed, Drainage District No. 2 did nothing to protect itself, notwithstanding it had the continuous duty of maintenance, strengthening and repair of either Denver Avenue or the western embankment. All of this time the district had sovereign power of eminent domain and assessment for such purposes. (See O.C.L.A. §123-101).

The appellants' assignments of errors depend entirely upon the sufficiency of the evidence to support the findings. A pre-trial order, prepared with meticulous care, was filed in this case and constituted almost the entire evidence. There was little oral evidence offered and admitted in addition to the pre-trial order, which does not add to or detract from the facts set forth in the pre-trial order.

Without setting forth each assignment of error, suffice it to say the findings of the trial court are fully substantiated by the transcript of the record.

An identical factual situation was presented to this court by the inhabitants of Vanport wherein this court in Clark v. U.S., 218 F. 2d 446 at page 451 said:

"As to the liability of the United States because of the alleged negligence of the Engineers, we think a provision of 33 U.S.C.A. §702(c) bars recovery. That section places certain conditions upon federal expenditures in aid of flood control and provides that: 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.' Appellants assert that this provision applies only to flood control aid on the Mississippi; however, supplemental acts authorizing expenditures on other rivers incorporate this provision. 33 U.S.C.A. §701(e). We find no merit in appellants' contention that the Tort Claims Act repealed this provision by implication. The provision of 33 U.S.C.A. §702(c) barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See National Mfg. Co. v. United States, 8 Cir., 1954, 210 F. 2d 263, 270-275, certiorari denied, 347 U.S. 967, 74 S. Ct. 778."

The Honorable James Alger Fee, the trial judge in his finding 6 [page 147 of the transcript of record] found as follows:

"6. The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had causal connection with any damage to plaintiffs' property."

The evidence unmistakably discloses that the failure of the railroad embankment in District No. 1 was the

sole and proximate cause of the flooding of District No. 2, an embankment over which the government at no time had any control. This eliminates any consideration as to the ring embankment. [Restatement, Torts §431 & §433 (1934); 65 C.J.S. p. 645, §103 et seq.; 14 C.J.S. p. 45; Aune v. Oregon Trunk Ry. et al., 51 P. 2d 663 (Sup. Ct. Or. 1935); Leavitt v. Stamp et al., 293 P. 414 (Sup. Ct. Or. 1930); Brady v. Oregon Lumber Co. et al., 245 P. 732 (Sup. Ct. Or. 1926)].

Since the argument in this case, appellants have called to our attention the recent Supreme Court case of Indian Towing Co. v. U.S., 350 U.S. 61, but it is difficult to rationalize that case with the one at bar. Apparently appellants feel the government owed a duty to maintain the ring embankment for the protection of the inhabitants of District No. 2. If that is their contention, it must be remembered the ring embankment was built for the protection of District No. 1, in the event the levees in District No. 2 should fail. The protection of Drainage District No. 2 was solely the responsibility of said District. The inhabitants of District No. 2 had the power and duty to protect themselves. They cannot now, as an afterthought, charge the government with their own indifference until it was too late.

It should also be noted that the ring embankment was built by contractors and the underpass was also built by contractors under the sole supervision, jurisdiction and control of the Oregon State Highway Commission, consequently, if Drainage District No. 2 had any claim for damages such claims should have been pressed

against the contractors and the Oregon State Highway Commission. The record fails to show that any damage was caused by the wrongful act or omission of any employee of the government while acting within the scope of his office or employment. [Strangi v. U.S., 211 F. 2d 305; 28 U.S.C.A. §1346b].

For the foregoing reasons the judgment is affirmed.

(Endorsed:) Opinion. Filed Apr. 9, 1956.
Paul P. O'Brien, Clerk.

APPENDIX C

[Title of Court of Appeals and Cause.]

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: April 9, 1956
PAUL P. O'BRIEN, Clerk.

APPENDIX D

The Statutes of Oregon provided as follows:

Section 123-216 O.C.L.A. — ORS 551.140

"REALIGNMENT OF DIKES BY LANDOWNERS: PROCEDURE; EXPENSE; OWNER-

SHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

APPENDIX E

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These cases (Nos. 5190, 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331, 4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549 and 5633) were consolidated and tried during August, 1953, before the above-entitled Court, the Honorable James Alger Fee, Chief Judge, presiding and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed and submitted to the

Court for consideration and decision. After due consideration the Court, being fully advised, makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. The Court by this reference adopts as part of these findings of fact the findings of fact in the opinion of the Court on file in these consolidated cases and the Statement of Agreed Facts set forth in Paragraphs 1 to 20, inclusive, of Section C of the pertrial order on file herein.

2. On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County, Oregon, a strip of land cutting through a large body of property, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the County. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank. This highway became known as Denver Avenue. On March 26, 1937, the Oregon State Highway Commission took over control of Denver Avenue by resolution of the State Highway Commission and on that date Denver Avenue became an Oregon State highway. Since then Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department.

3. Denver Avenue was the boundary accepted by two drainage districts called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. District No. 1 was protected from flood on the north, west and south by railroad fills and levees. District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1), as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None of these fills, dikes or levees was owned or controlled by the United States.

4. In 1942 the United States condemned a great portion of the land in District No. 1 and the City of Vanport was erected thereon. For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. The underpass was built with the approval and under the supervision of the Oregon State Highway Commission. No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objection to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group.

5. Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in

District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 (which were lower than those of District No. 1), were overtopped. As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948, the western embankment of District No. 1 failed.

6. On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment at District No. 1 failed, permitting the flood waters to overflow that area. The flood waters, approaching Denver Avenue from the west, were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m. on May 31, 1948, when the ring levee constructed on the east of the Denver Avenue underpass failed. Thereupon District No. 2 and the properties of plaintiffs were inundated.

7. The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. The United States had not built the western embankment, did not own it, did not own the ground upon which it stood and did not at the date of failure and had not previously exercised any control over the structure. The United States had no duty to

insure the stability of the western embankment. The cause of the failure of the western embankment has not been shown and appears to be unknown. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure. The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. In the period between 1934 and 1944, the United States, acting through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2. District No. 2 approved the plans for the work but made no request that Denver Avenue be strengthened as part of the protective works. Denver Avenue was built and has ever since been used for highway purposes. Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes.

9. The flood water which inundated plaintiffs' property approached Denver Avenue and the ring levee from the west. In the exercise of due care, there was no reason to anticipate a failure of the western embankment of District No. 1, and hence no reason to anticipate that

flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen.

10. Peninsula Drainage District No. 2, in which plaintiffs' property was located, was organized by plaintiffs or their predecessors in interest under the drainage district laws of Oregon in 1917. District No. 2 was endowed with certain sovereign powers and was charged, as was each acre within its boundaries, with the responsibility of erecting adequate works for protecting the district lands from overflow. This duty was continuous and involved repair, maintenance and strengthening of existing walls and structures. District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the district. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure

to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs.

11. The Housing Authority of Portland is a federal agency and its employees are employees of the United States.

12. The employees of the Housing Authority of Portland are not shown to have done anything legally significant. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees.

13. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the United States or its employees or that plaintiffs suffered damage on that account.

14. Plaintiffs have failed to prove that the construction of the Denver Avenue underpass or the construction or maintenance of the ring levee surrounding that underpass violated any right of plaintiffs, that the ring levee was inadequate for the purpose intended or that, under the circumstances, the purposes for which the ring levee was constructed were not the proper purposes.

15. The contentions of plaintiffs as set out in the pretrial order that the construction of the Denver Avenue underpass was negligent, wrongful and a trespass on plaintiffs' property, that the Denver Avenue fill constituted a levee and, as such, part of the plan for reclamation of District No. 2, that plaintiffs relied on the Denver Avenue fill as security against flood waters, that the ring levee around the Denver Avenue underpass was

inadequate and unsuitable for the purpose intended, that the ring levee was negligently maintained and constituted a nusiance, and that the County of Multnomah and its successors in interest had an obligation to maintain the Denver Avenue fill as a dike, have not been proved.

16. The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees.

Conclusions of Law

1. The Court by this reference adopts the conclusions of law set forth in the opinion of the Court on file in these consolidated cases.

2. The jurisdiction of this Court is invoked under the provisions of the Federal Tort Claims Act.

3. The legal rights and duties of the parties to these actions depend on the Federal Tort Claims Act and the law of Oregon.

4. Under the law of Oregon damages can be recovered only if a duty is owing from the defendant, the defendant has breached that duty and injury and damage have resulted to the plaintiff for which the breach of duty is the proximate cause.

5. Under the law of Oregon the legal duty to protect plaintiffs' property from flood damage rested on

Peninsula Drainage District No. 2 and on plaintiffs themselves as land owners within the district. This duty was continuous and involved the repair, maintenance and strengthening of existing flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage.

6. The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had casual connection with any damage to plaintiffs' property.

7. Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act.

8. The provisions of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and its not repealed by the Federal Tort Claims Act.

9. The United States is entitled to judgment.

10. Each party shall bear his or its own costs of suit.

These findings of fact and conclusions of law are in accordance with the pretrial order, the record made on

the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

Dated: September 14, 1954.

/s/ JAMES ALGER FEE,
Circuit Judge; Sitting by
Special Assignment.

Affidavit of Service by Mail attached.
[Endorsed]: Filed September 14, 1954.

APPENDIX F

EXHIBIT No. 23

Permit

Whereas, Kaiser Company, Inc., and the Oregon Shipbuilding Corporation are engaged in the construction of ships and other facilities for the United States Government in or near Portland, Oregon, and in connection with said operations and activities large numbers of persons are employed; and

Whereas, existing housing accommodations and highway facilities are inadequate for the accommodation of the thousands of people employed by said corporations; and

Whereas, the Federal Public Housing Authority is engaged in the construction of a housing project (Project No. ORE-35053) for the use and accommodation of persons employed by the said corporations; and

Whereas, in connection with said housing project and in cooperation with the State Highway Commission there has been designed by the Highway Commission and is being constructed by the Federal Public Housing

Authority a highway project which requires the construction of an underpass beneath Denver Avenue, which is a state highway under the jurisdiction of the State Highway Commission; and

Whereas, the State Highway Commission recognizes the urgent need of the early completion of said highway facilities, including said underpass;

Now, Therefore, a permit is herby granted to the Federal Public Housing Authority for the construction of an underpass within the right of way and beneath the roadbed of Denver Avenue, but subject, however, to the following conditions and provisions:

1. Said underpass shall be constructed at state highway engineer's station 66+90.66.

2. Said underpass shall have an unimpaired vertical clearance of fifteen feet and an unimpaired horizontal clearance of twenty-six feet from each traffic lane.

3. The structure and appurtenant facilities shall be built in accordance with plans, specifications and design prepared by the Highway Commission, copies of which, consisting of two sheets, are attached hereto and by this reference made a part hereof.

4. The State shall at its expense provide an inspector or inspectors who shall be present during the construction of said project and shall inspect and supervise the work.

5. The permitee may construct said underpass and appurtenant facilities with its own forces or by contract

or such other method as may best suit the convenience of the permittee.

6. During construction the permittee shall cause proper and adequate protection to be maintained at all times for the safety of the members of the public using or having lawful occasion to be on or about Denver Avenue.

7. After said structure has been completed it shall be maintained by the State, but the permittee shall reimburse the State for all expenditures made in connection with such maintenance of the structure and appurtenant facilities within the state highway right of way; provided, however, that the permittee's obligation to maintain said structure or reimburse the State for its maintenance shall not extend beyond the duration of the war; and provided that reimbursements shall be for actual expenditures only, and in no event shall maintenance cover any part of the project which is outside of the state highway right of way.

8. By accepting this permit the permittee shall thereby assume the obligations herein specified.

Dated this 5th day of November, 1942.

OREGON STATE HIGHWAY COMMISSION.

By /s/ HARVEY F. CABELL,
Chairman;

By /s/ [Indistinguishable],
Commissioner;

By /s/ HERMAN OLIVER,
Commissioner;

Attest:

/s/ [Indistinguishable],
Secretary.

Approved:

/s/ [Indistinguishable],
State Highway Engineer.

Acceptance of Permit

The undersigned Federal Public Housing Authority hereby accepts the foregoing permit and assumes the obligations therein imposed on it and agrees to conform to the same.

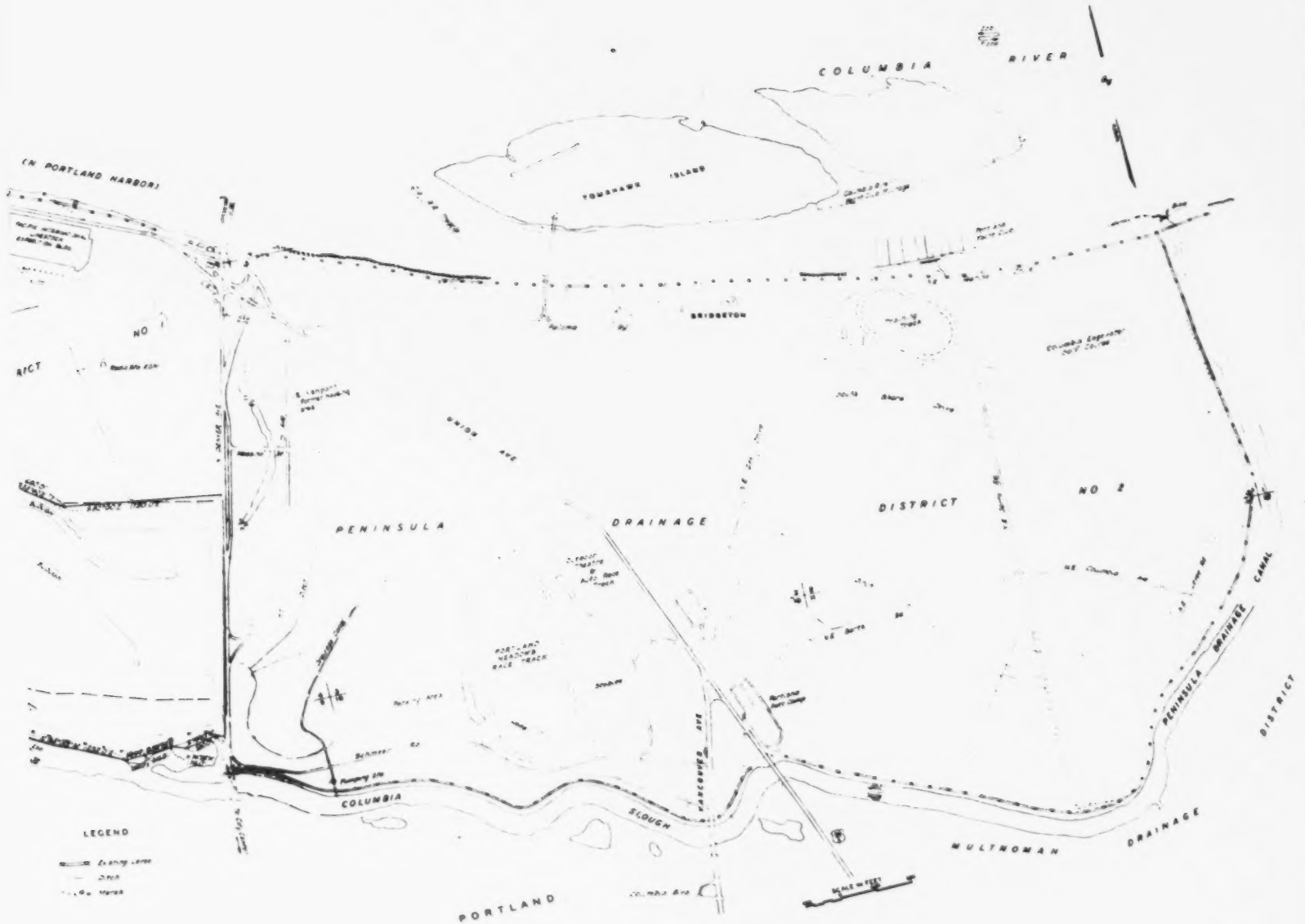
Dated this 12th day of November, 1942.

FEDERAL PUBLIC HOUSING AUTHORITY,

By /s FRANK M. CRUTSINGER,
For the Federal Public
Housing Commissioner.

JMD:PW
11/2/42.

OREGON
SLOUGH
DISTRICT
DRAINAGE
PENINSULA
VANPORT CITY
FORMER HOUSING AREA
COLUMBIA


COLUMBIA RIVER
(IN PORTLAND HARBOR)
TOMAHAWK ISLAND
BRIDGETON
PENINSULA DRAINAGE DISTRICT NO 2
COLUMBIA SLOUGH
MULTNOMAH DRAINAGE DISTRICT
PENINSULA DRAINAGE CANAL
PORTLAND
LEGEND

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 296

MEARL C. TILLMAN AND EMILY P. TILLMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 127–138; Pet. App. 31–41) is not reported. The opinion of the Court of Appeals (Pet. App. 41–48) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1956 (Pet. App. 48). A timely petition for rehearing was denied on May 15, 1956. The petition for a writ of certiorari was filed on August 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below correctly held that, on the concurrent fact findings which petitioners dispute, and as a matter of the local law which applies under the Tort Claims Act, the United States was not liable for the flood damage sustained by petitioners.

2. Whether, in light of the Flood Control Act of 1928, the United States can be held liable for flood damage resulting from the 1948 flood of the Columbia River and its tributaries.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act (28 U. S. C. 1346 (b), 2671, *et seq.*) and of the Flood Control Act of 1928 (45 Stat. 534, 535, 536 (33 U. S. C. 702c)), are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

During the latter part of May, 1948, the Columbia River and its tributaries in the Pacific-Northwest were in flood. More than fifty cities and towns, together with suburban and agricultural areas, were affected to a greater or lesser degree. During the high water period more than 10,000 persons participated in a flood fight which involved 475 miles of levees protecting approximately 200,000 acres of land. Before the flood was over, it caused property damage estimated at $100,000,000, and 400,000 acres of land were inundated, including the land encompassed by Oregon Peninsula Drainage Districts No. 1 and No. 2 (R. 80–82). The present litigation is the outgrowth of the flooding of Drainage District No. 2. This case

is the pilot case for 52 property damage claims against the United States which were consolidated in the District Court for the purpose of determining government liability (R. 13, 139).

1. *Peninsula Drainage Districts Nos. 1 and 2.*— Peninsula Drainage Districts Nos. 1 and 2 are located on the outskirts of Portland, Oregon, along the southern bank of the Columbia River, approximately five miles above the confluence of the Columbia and Willamette Rivers (R. 15, 16). The area between the confluence of the rivers is open land subject to flood during periods of high water. District No. 1 is protected on three sides by levees: on the north along the river (R. 30), on the south along Columbia Slough (R. 31), and on the west by the western embankment, so-called, a structure consisting of two railroad fills and a highway fill (R. 38). Along the eastern boundary of District No. 1 is a highway known as Denver Avenue, and beyond and to the east of the highway is Drainage District No. 2 (R. 16). District No. 2 is surrounded by its own levee system: on the north along the river (R. 16), on the south along Columbia Slough (R. 16) and on the east along an excavated channel known as the City Cut. The combined levee systems of the two Districts completely enclose both Districts Nos. 1 and 2. Along the western boundary of Drainage District No. 2, as noted above, lies Denver Avenue (R. 16). See map, Pet. App. 63.

Peninsula Drainage District No. 1, the downstream district, was organized on June 1, 1917 (R. 25). At that time the fill which carries Denver Avenue was

already in existence (R. 30) and the railway fills along the west side of the district were, or were about to be, constructed (R. 30). Shortly thereafter, on September 25, 1917, District No. 2 was organized (R. 17, 302–333). During the following year the District No. 1 levees were completed (R. 30–31) and within a year or two District No. 2 had built levees on the north, south and east (R. 17), thus completing the levee protection for the two Districts. In the period between 1936 and 1941, the Corps of Engineers raised and reconstructed the north and south levees of District No. 1 (R. 32, 35) and the north, south and east levees of District No. 2 (R. 19, 22). The work of the Corps of Engineers at District No. 1 was completed in 1941 (R. 34), and at District No. 2 in 1940 (R. 22). The levees surrounding both drainage districts do not belong to the United States (R. 22, 35).

2. *Denver Avenue.*—Highway traffic going north from Portland crosses the Columbia River on the so-called Interstate Bridge. Denver Avenue, the boundary running north and south between District No. 1 and District No. 2, and the fill supporting it were constructed in 1915 and 1916 as an approach to this bridge by Multnomah County at the expense of the Interstate Bridge Commission (R. 22).[1] The In-

[1] The fill was constructed on a right-of-way conveyed in fee to Multnomah County by Peninsula Industrial Company by a deed dated March 16, 1915 (R. 23, 455). The deed also granted slope easements to the county, that is, the right to locate the slopes of the fill on the adjoining property of the grantor (R. 457). The deed reserved to the grantor the right to construct public and private highway crossings (R. 458), railroad tracks (R.

terstate Bridge Commission transferred control of Denver Avenue to Multnomah County on January 1, 1929 (R. 27). On March 26, 1937, the Oregon State Highway Commission took charge of Denver Avenue and on that date Denver Avenue became an Oregon state highway (R. 27). Since then, Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department (R. 28). Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 and 1916 (R. 28). It is one of the principal approaches to the Interstate Bridge (R. 245) and it is heavily traveled.

(a) *The Denver Avenue Underpass.*—During the summer of 1942 Kaiser Company, Inc., in order to provide war housing for its shipyard employees (R. 45), contracted with the Federal Public Housing Authority to construct, within District No. 1, on a cost-plus-a-fixed fee basis, a housing project known as Vanport (R. 47). Since Vanport was to provide housing for several thousand persons (R. 47), highway access to and from the area had to be provided. Denver Avenue, which parallels the project, was avail-

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458), underground pipes and conduits (R. 459) and two deep water channels "not to exceed one hundred (100) feet in width" across, under or through the right-of-way (R. 459). The deed went on to provide that it was made upon the express condition "that the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained * * * a fill and embankment" on the property "and shall, within said period, provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover * * *" (R. 461-2).

able for this purpose. But because of the heavy traffic on Denver Avenue to and from the Interstate Bridge any arrangement whereby Vanport traffic would cross Denver Avenue traffic at grade would have been "highly dangerous" (R. 246, 283). Accordingly, the Kaiser interests proposed to the Oregon State Highway Commission that an underpass be constructed through Denver Avenue, thus permitting the Vanport traffic to enter Denver Avenue without crossing it (R. 283). The Highway Commission approved this proposal (R. 246) and furnished detailed plans and specifications for the underpass (R. 49, 288, 290, 292). The underpass was constructed in accordance with the Commission plans (R. 49) under the supervision of a Commission engineer (R. 50). The actual work was done by a Portland contractor (R. 49) under a contract (R. 259–281) with Kaiser approved by the Federal Public Housing Authority (R. 281). Work on the underpass began in November, 1942, and was completed in February or March, 1943 (R. 49–50).

(b) *The ring levee.*—By condemnation proceedings, commenced January 12, 1943, the United States acquired 4.53 acres of land in the area to the east of the Denver Avenue underpass (R. 58). On January 7, 1944, the United States filed a petition for condemnation and obtained possession of 136.11 acres to the east of Denver Avenue on which was constructed a temporary housing development known as East Vanport (R. 58).

About the time the Denver Avenue underpass was being constructed, a semi-circular ring levee was built around and to the east of the underpass (within District No. 2) on land owned by the United States (R. 58). The work was done by the contractors working on the underpass (R. 50). The ring levee was completed in April, 1943 (R. 50). In the fall of 1943, a Portland contractor, acting pursuant to arrangements with one of the Vanport subcontractors and in accordance with plans prepared by Kaiser Company, Inc., raised the elevation of the ring levee, widened its top and placed a clay blanket on its eastern or outside slope (R. 50–51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland (HAP), the lessee of the Vanport and East Vanport housing projects, discovered cracks and sloughs in portions of the ring levee (R. 54). In the summer or fall of that year, HAP employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred and filling in the cracks (R. 54). There was no further difficulty with the levee (R. 418) prior to May 31, 1948 (R. 54).

3. *The flooding of Districts Nos. 1 and 2.*—On the afternoon of May 30, 1948, the railroad and highway fills which constituted the western embankment at District No. 1 failed (R. 80), permitting flood water to fill District No. 1 (R. 81), thereby flooding and destroying Vanport. The following morning, District No. 2 was evacuated by order of the Oregon Governor (R. 81).

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As the flood waters filled District No. 1 they advanced across the district and began to exert pressure on the Denver Avenue fill and, by passing through the Denver Avenue underpass, on the ring levee. Trouble first developed, not with the ring levee, but with the fill itself at the site of a large culvert, approximately five feet by five feet in size, constructed through the fill at about ground level (R. 53). The flood water blew out the plugs in the culvert and the fill began to cave and slough (R. 184, 209–210, 217, 248), but the culvert was replugged, thus averting a failure at that point. Shortly thereafter, however, the ring levee suddenly broke, permitting the flood water to enter District No. 2 (R. 81).

The failure of the ring levee permitted the flood waters to advance across District No. 2 from Denver Avenue to Union Avenue, another highway fill so located that it bisects the District in a diagonal fashion (R. 55). Union Avenue held the water for two or three hours; then it, too, failed (R. 81), permitting the flood to inundate the entire District and thus to contribute to the damage which gave rise to these actions (R. 81).

4. *Proceedings in the courts below.*—The complaint in this case (R. 3–8) was filed on December 15, 1949. The jurisdiction of the District Court was invoked under the Federal Tort Claims Act (R. 3). So far as is now material, it was alleged that flood damages totalling $6,987.45 were sustained by petitioners "because of the wrongful and tortious act of the Federal Public Housing Authority and the U. S. Army Corps of Engineers, as agents and instrumen-

talities of the defendant, in cutting, severing and removing a portion of said Denver Avenue levee" as a result of which "the levee was rendered useless as a protection against the flood waters" (R. 6–7).

The case was tried by the District Court primarily upon an agreed statement of facts (R. 14–84), incorporated in the court's pre-trial order (R. 13) and adopted as part of its findings of fact (R. 139). In addition to the agreed facts, the District Court, *inter alia* (R. 139–146), found that the sole cause of the damage complained of was the failure of the western embankment of District No. 1 which had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works; that the western embankment was not built by the United States; that the United States did not own the ground on which it stood, and did not on the date of failure, or previously, exercise any control over the structure (R. 142). The court found that Denver Avenue was built and has ever since been used for highway purposes; that it was not intended to be a levee and was not designed as a water-repellent wall or structure; that the Plan for Reclamation of District No. 2 stated that no reliance was placed on Denver Avenue and Denver Avenue is mentioned only casually as furnishing additional protection; that between 1934 and 1944, the United States, through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2, which approved the plans but made no request that Denver Avenue be strengthened as part of the protective works; that neither Multnomah County, the State of Oregon, nor the United States had any obligation to

maintain Denver Avenue as a levee or for flood protection purposes (R. 143).

The court further found the water which inundated District No. 2 approached Denver Avenue from the west, *i. e.,* from downstream; that, in the exercise of due care, there was no reason to anticipate the failure of the western embankment of District No. 1 and no reason to anticipate that flood waters would ever approach Denver Avenue from the west; that no one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment broke; that the failure of the ring levee and the inundation of District No. 2 resulted from a set of circumstances unforeseen and, in the exercise of due care, unforeseeable (R. 143–144); and that the construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to petitioners (R. 144).

The court went on to find that there was a failure of proof of any negligence or wrongful act on the part of the United States or its employees; that there was a failure of proof that the construction of the underpass or the construction and maintenance of the ring levee violated any right of petitioners, or that the ring levee was not constructed for a proper purpose or was inadequate for the purpose intended (R. 145–146).

As a matter of Oregon tort law, the District Court, upon the facts as agreed and as found, denied recovery (R. 146–147) and further concluded that 33 U. S. C.

702c (Appendix, *infra*, p. 20), which precludes the imposition of liability for flood damage upon the United States, was an absolute defense to the actions (R. 147).

On appeal, the Court of Appeals affirmed (Pet. 48). The appellate decision rests upon two grounds: (1) that "the findings of the trial court are fully substantiated by the transcript of record" and preclude recovery (Pet. App. 45), and (2) in accordance with the ruling in the prior litigation arising from the flooding of District No. 1,[2] that 33 U. S. C. 702c bars recovery on these claims from the United States (Pet. App. 45–46).

ARGUMENT

Applying conventional principles of local tort law to the particular facts of this case, both courts below have agreed that there is no factual or legal basis for the imposition of liability upon the United States. As an additional, independently sufficient ground of decision, they also agreed that petitioners' claims are precluded by the express statutory prohibition against holding the United States liable for flood damage. These concurrent rulings are clearly correct, and there is neither a conflict nor any other basis for further review by this Court.

1. (a) The District Court found as a fact (R. 143; Pet. App. 52), and the Court of Appeals agreed (Pet. App. 46–47), that the sole and proximate cause of petitioners' damage was "the failure of the western embankment at District No. 1" (R. 142; Pet. App.

[2] *Clark* v. *United States*, 218 F. 2d 446 (C. A. 9).

52). It was further found and agreed that the land on which the western embankment rests "does not belong to the United States" (R. 42, 142) and that the embankment was not built, maintained or controlled by the United States (R. 142; Pet. App. 52).

The Tort Claims Act, following the general tort rule, permits the imposition of tort liability upon the United States only when the damage complained of is "*caused* by the negligent or wrongful act or omission" of a Government employee. 28 U. S. C. 1346 (b) (emphasis added). Here, no negligent act of the United States or its employees was in any way associated with the failure of the western embankment. Clearly, therefore, there is no basis in fact for holding the United States responsible for petitioners' damage, proximately caused by the failure of the embankment. *Schutt* v. *Hull*, 193 Or. 18, 236 P. 2d 937; *Cosgrove* v. *Tracey*, 156 Or. 1, 64 P. 2d 1321; *Aune* v. *Oregon Trunk Ry.*, 151 Or. 622, 51 P. 2d 663; *Restatement of the Law, Torts*, § 430.

(b) Inquiry as to the Government's liability for petitioners' damage might well end with the factual determination that the sole cause of petitioners' damage was the failure of the western embankment, for which the United States was in no way responsible. It should be noted, however, that apart from this weakness, there are additional factual answers to petitioners' claim.

Petitioners' contention that the severance of the Denver Avenue fill and the construction of the underpass were wrongful is based upon the premise that the

Denver Avenue fill was designed as a levee for flood protection, rather than for highway purposes as found by the District Court (R. 142–143; Pet. App. 53). Since the underpass was built "by contractors under the sole supervision, jurisdiction and control of the Oregon State Highway Commission" (Pet. App. 47), it is difficult to see how petitioners' argument in this respect materially advances their claim against the United States. But in any event the underlying premise that Denver Avenue was a levee finds no evidentiary support in the record.

The Denver Avenue fill was built before Drainage Districts No. 1 and 2 were organized (R. 17, 22, 25). While it ultimately became a common boundary between the two Districts, it was built exclusively for highway purposes by the County of Multnomah, at the expense of the Interstate Bridge Commission, as a vehicular approach to the Interstate Bridge (R. 22).[3] It has always been used for highway purposes (R. 28). Prior to May, 1948, Denver Avenue was never considered to be a levee or dike by Drainage District No. 2 (R. 334–338, 339, 342, 344) for the obvious reason that, while Denver Avenue was a common boundary between Districts Nos. 1 and 2, the flood protection of both Districts was from the combined levee systems which completely enclosed both Districts. Moreover, neither the County of Multno-

[3] See the right-of-way deed of 1915 (R. 455–463) and the correction deed of 1926 (R. 465–468), which make it clear that the conveyance to Multnomah County in 1915 was primarily for highway purposes.

mah (R. 455–463, 465–468), the State of Oregon nor the State Highway Commission (R. 246–247, 255, 289–290) regarded the Denver Avenue fill as a dike or levee. And since it was not intended to be a dike or levee, the fill was not constructed as a dike or levee (see R. 53), nor was it maintained by either District as the levees surrounding the Districts were maintained (R. 19–22, 32–35).

In short, the record amply supports the finding of the District Court, sustained by the Court of Appeals, that neither the County of Multnomah, the State of Oregon, nor the United States had any "obligation to maintain Denver Avenue as a levee or for flood protection purposes" (R. 143; Pet. App. 53). And because Denver Avenue is a State highway, on land owned by the State and maintained by the State (R. 27–28), there was, of course, no impropriety or breach of petitioners' rights, when, at the suggestion of Kaiser Company, Inc., (R. 48–49), and according to plans drawn up by the State and under State supervision (R. 246), the Denver Avenue underpass was constructed by private contractors (R. 49) under a contract with Kaiser Company, Inc., approved by the Federal Public Housing Administration (R. 281).

It is universally recognized that one of the essential elements of a tort action is that the conduct complained of must have invaded an interest which is entitled to protection. The same element is essential to a recovery against the United States under the Tort Claims Act. 28 U. S. C. 1346 (b), 2674, Appendix, *infra*, pp. 19, 20. Here, it not only appears that the severance of the fill and the construction of the

underpass, of which petitioners' complain, were not the acts of employees of the United States, but, as found by the courts below, that the United States owed no duty to District No. 1 or 2 to provide flood protection in any form whatsoever. *Clark* v. *United States,* 218 F. 2d 446, 452 (C. A. 9). In these circumstances, there is no room for quarrel with the judgments of the courts below. *Restatement of the Law, Torts,* § 281; *Prosser on Torts,* p. 177 ff; *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 341, 162 N. E. 99.

Nor did the United States become obligated to furnish flood protection to petitioners by the erection of the ring levee on land condemned by the United States. With respect to the ring levee the District Court found that its purpose was to afford some protection to District No. 1 against the possible overflow of the upriver dikes of District No. 2 to the east of the ring levee, which were lower than the levees of District No. 1 (R. 43–44, 141; Pet. App. 52). There was no proof that the ring levee was inadequate for this purpose or improperly repaired or maintained (R. 145; Pet. App. 55). Though contradicted, there was expert testimony that the ring levee afforded secondary protection to District No. 2 against water coming from the west comparable or superior to that afforded by the Denver Avenue fill (R. 227–228, 243). And, though again there is testimony to the contrary (R. 205), R. H. Baldock, the chief engineer of the State Highway Commission, and Harry K. Doyle from the Corps of Engineers, both of whom participated in the Denver Avenue

flood fight, testified that in their opinion the Denver Avenue fill, even in absence of the underpass, would itself have failed if the ring levee had not (R. 217, 249).

The flood waters approached from the west because of the unforeseeable failure of the western embankment of District No. 1 (R. 219, 224, 237, 414, 423). And as the District Court found, even Denver Avenue was not contemplated as a "bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke" (R. 143; Pet. App. 54). In short, the failure of the western embankment, the failure of the ring levee, the failure of Union Avenue fill (R. 81–82), the complete inundation of District No. 2 and, finally, petitioners' damage, were the result of a set of circumstances unforeseen and unforeseeable by anyone, including petitioner (R. 143–144; Pet. App. 54). The United States and its employees breached no duty owing to petitioners and no negligent or wrongful act of Government employees has been shown to support a tort claim against the United States. Though petitioners argue extensively (Pet. 12–24) with the amply supported concurrent findings requiring the judgment below, their factual arguments present no basis for review by this Court. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214.

2. While the foregoing considerations are dispositive of the case, both courts below were in agreement that 33 U. S. C. 702c, App., *infra,* p. 20, is,

independently, an additional bar to recovery on petitioners' flood claims asserted against the United States. 33 U. S. C. 702c, in pertinent part, provides that: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *" This statutory provision has the effect of immunizing the United States from flood damage liability (*National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967; *Clark* v. *United States*, 218 F. 2d 446 (C. A. 9)), and defeats petitioners' suit.

3. The question decided by this Court in *Indian Towing Co.* v. *United States*, 350 U. S. 61, is not even remotely involved in this case. As shown above, the decision of the Court of Appeals denying recovery rests upon the application of settled principles of local tort law to facts peculiar to this case and upon the statutory prohibition against governmental liability for flood damage. There is not the slightest warrant for petitioners' assertion that the decision here is in conflict with *Indian Towing*.[4]

[4] Neither is there merit to the constitutional questions which the petition seeks to raise. The complaint that petitioners were denied a fair trial (Pet. 26–28) comes for the first time in this Court, and is frivolous. The claim that the construction of the Denver Avenue underpass, in 1942 and early 1943, was a taking of petitioners' property without just compensation or due process of law (Pet. 28) is also baseless, and, in any event, such a claim was barred by limitations when this Tort Claims Act suit was filed on December 15, 1949. 28 U. S. C. 2401 (a).

CONCLUSION

The decision of the Court of Appeals is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.

APPENDIX

1. The pertinent provisions of the Federal Tort Claims Act, as codified in 28 U. S. C., provide:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, tempo-

rarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

SECTION 2674. *Liability of United States.* The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

2. The 1928 Flood Control Act provides in pertinent part (Act of May 15, 1928, 45 Stat. 534, 535, 536 (33 U. S. C. 702c)).

Section 3.

* * * * *

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

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